UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHINESE AUTOMOBILE DISTRIBUTORS OF AMERICA, LLC, a limited liability company, individually and, with respect to certain claims, in a derivative capacity, Plaintiff, v. MALCOLM BRICKLIN, an individual; JONATHAN BRICKLIN, an individual; BARBARA BRICKLIN JONAS, an individual MICHAEL JONAS, an individual; SCOTT GILDEA, an individual; and VISIONARY VEHICLES, LLC, a limited liability company, Defendants.	:	ELECTRONICALLY FILED 07 Civ. 4113 (LLS)

MEMORANDUM OF DEFENDANT SCOTT GILDEA
IN SUPPORT OF MOTION TO DISMISS

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Defendant Scott Gildea respectfully submits this memorandum of law in support of his motion for an Order (1) dismissing the complaint of plaintiff Chinese Automobile Distributors of America, LLC ("CADA" or "plaintiff")(the "Complaint"), for (a) lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure ("FRCP") and 28 U.S.C. § 1367 and (b) failure to state a claim upon which relief can be granted and to plead such a claim with adequate specificity, pursuant to FRCP 12(b)(6) and FRCP 9(b); and (2) granting such other relief as the Court may deem just and proper.

SUMMARY OF ARGUMENT

This is an action brought by plaintiff against defendants Visionary Vehicles LLC ("VV"), Malcolm Bricklin ("Mr. Bricklin"), Jonathan Bricklin, Barbara Bricklin Jonas, Michael Jonas, Sania Teymeny (collectively the "Bricklin defendants") and Scott Gildea ("Mr. Gildea"), who is alleged to be Mr. Bricklin's personal accountant and the corporate accountant for VV. See Declaration of Stephen Jacobs, Ex. A, Verified Complaint ("Compl.") ¶¶ 3-9.

In essence, plaintiff alleges certain "fraud and misdeeds" were perpetrated by Mr. Bricklin and members of his family and associates" in connection with a "proposed business venture to import and distribute in the United States automobiles manufactured in China."[1] Id. ¶ 1. As more specifically described below, plaintiff claims that Mr. Bricklin and VV engaged in fraudulent conduct and that all defendants herein engaged in the misappropriation of VV's corporate funds and waste of VV's funds and assets. See Id.

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[1] Mr. Gildea does not, of course, concede the accuracy of any of the allegations of the complaint, but treats them as true for

As respects Mr. Gildea, plaintiff alleges, in conclusory terms and without factual support, that Mr. Gildea knowingly or recklessly aided and abetted Mr. Bricklin in committing fraud and that Mr. Gildea, along with all the other defendants herein, misappropriated corporate funds and engaged in corporate waste. Id. Counts Two, Four and Five.

Plaintiff does not claim that Mr. Gildea violated federal law, or plead with any particularity the specific acts of alleged misappropriation or waste purportedly engaged in by Mr. Gildea. Plaintiff alleges as its sole basis for federal subject matter jurisdiction one of its six counts: Count Three, which alleges that Mr. Bricklin and VV, but not Mr. Gildea or the other defendants, violated "Section 10(B)(5) of the Securities and Exchange Act of 1934."

For the reasons set forth in the Bricklin defendants' pending motion to dismiss (the "VV Motion"), in which Mr. Gildea joins, the Third Count should be dismissed pursuant to FRCP 12(b)(6), FRCP 9(b), and the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b), for failure to state a claim and to plead with

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purposes of this motion, as is required.

requisite particularity, and the remaining state law claims should be dismissed pursuant to FRCP 12(b)(1) and 28 U.S.C. § 1367(c)(3).

As set forth in Point I below, even if the Bricklin defendants' motion is denied, this Court should not exercise supplemental jurisdiction over the state court claims asserted against Mr. Gildea because the state claims dominate, both in number and scope.[2] As set forth in Point II below, should the Court nonetheless exercise supplemental jurisdiction over the three state law causes of action asserted against Mr. Gildea, it should dismiss those claims for failure to state a claim and to plead with requisite particularity.

STATEMENT OF FACTS

Plaintiff alleges that Mr. Bricklin is the Chief Executive Officer of VV, a venture established to partner with Chinese manufacturers of automobiles for the purpose of importing, distributing and selling automobiles in North America. Compl. ¶¶ 1, 3. Mr. Gildea is alleged to have been Mr. Bricklin's personal accountant and the corporate accountant for VV, who "[u]pon information and belief, ... was responsible for, or participated in, the improper accounting described here." Id. ¶ 9. Plaintiff alleges that it is an investor in VV. Id. ¶ 18.

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[2] Plaintiff alleges that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 78aa because "it is a civil action arising under the laws of the United States...." Plaintiff cannot allege that this court would have subject matter jurisdiction pursuant to 28 U.S.C. § 1332, diversity of citizenship, because plaintiff and VV are both Delaware corporations. See Compl. at ¶¶ 2, 4.

The Complaint alleges that, in December 2004, VV entered into a letter of intent to form a joint venture with Chery Automobiles ("Chery"), an automobile manufacturer in China. Id. ¶ 14. Pursuant to their agreement, Chery would manufacture automobiles in accordance with VV's specifications and VV would import and oversee distribution of the vehicles in the United States through a network of dealers spread over certain sales territories. Id. ¶ 14-15.

Plaintiff claims that, on or about October 21, 2005, it made a $2 million investment in VV (in exchange for 800,000 shares ("units") in VV) to provide funding for VV to pursue a joint venture with a Chery. Id. ¶ 18. (Plaintiff does not base a securities fraud or any other claim with respect to this investment.)

Plaintiff alleges that Mr. Bricklin rejected at least one potential source of financing because of his unwillingness to cede control of VV to the financing party. Id. ¶ 24.

In February and March 2006, CADA allegedly made another $2 million investment in VV in exchange for more units in VV. Id. ¶¶ 20-21. Plaintiff alleges that it was fraudulently induced into investing this amount due to the following "misrepresentations" by Mr. Bricklin and VV:

a. The relationship between Malcolm Bricklin and Chery was very strong. Chery credited Malcolm Bricklin, Visionary Vehicles, and the publicity surrounding the joint venture, for much of Chery's success and growth in 2005. Chery preferred to deal with Malcolm Bricklin rather than any other automobile manufacturer and, therefore, Chery would extend the time required to fund the joint venture beyond the original deadline by which funding had to be obtained.

b. Visionary Vehicles was successfully selling the Territories and had commitments of $50,000,000 (fifty million dollars). However, Visionary Vehicles needed an additional $2,000,000 (two million dollars) to survive until the joint venture with Chery was formed and approved.

c. Visionary Vehicles required additional funding to make payroll. If Visionary Vehicles was unable to meet its payroll demands, Visionary Vehicles would lose important personnel who would be instrumental in obtaining the exclusive distribution agreement with Chery.

d. Visionary Vehicles was in danger of filing bankruptcy. If Visionary Vehicles did file for bankruptcy, Plaintiff could lose its First Investment.

Id. ¶ 20.

Plaintiff claims, "[u]pon information and belief," that these statements were known to be false and made for the purpose of inducing plaintiff to invest the additional $2 million in February and March 2006. Id. ¶ 29. Plaintiff alleges that VV had not raised $50 million in commitments from investors at the time the statements were made; that VV was in financial difficulty not because of the necessity of keeping important personnel on the payroll, but because VV "was being systematically looted by Malcolm Bricklin and the other Defendants." Id. ¶ 22. The Complaint further alleges that, "upon information and belief, Defendant Bricklin and the other Defendants engaged in corporate malfeasance and self-dealing" through frequently undocumented cash withdrawals of company funds, allegedly excessive payments to persons or entities tied to Mr. Bricklin, and other allegedly questionable payments. Id. ¶ 26. None of the examples alleged reference Mr. Gildea. Id.

Count One alleges common law fraud against Mr. Bricklin and VV.

Count Two alleges aiding and abetting common law fraud against Barbara Jonas and Michael Jonas (who are alleged to be Mr. Bricklin's sister and brother-in-law, Id. ¶¶ 6-7), as well as Mr. Gildea. In wholly conclusory fashion, two of its four paragraphs allege that these three defendants "knowingly or recklessly provided substantial assistance to the frauds committed by Malcolm Bricklin" and "reasonably should have known that the assistance they provided to the frauds of Malcolm Bricklin would have the consequence of harming Plaintiff." Id. ¶¶ 33-34.

Count Three alleges, in five one-sentence paragraphs, that Mr. Bricklin and VV violated "Section 10(B)(5) of the Securities and Exchange Act of 1934" by making "materially false and misleading statements concerning the financial position of Visionary Vehicles and the proposed joint venture with Chery ...." Id. ¶¶ 36-40.

Count Four alleges, in five paragraphs, "misappropriation of corporate funds" by all the defendants, both on plaintiff's own behalf and derivatively on behalf of VV. Id. ¶ 47.[3] In particular, Paragraph 44 alleges:

> As a result of Defendants' actions in *inter alia* (a) making large cash withdrawals for unsubstantiated purposes, (b) using corporate funds for person travel and entertainment, (c) paying related parties unreasonable fees in connection with consulting agreements, (d) making large expenditures for "Wellness" absent appropriate corporate approval, (e) claiming large expenditures for "promotional gifts" without sufficient justification for such expenditures, and (f) diverting ten percent of all investments to an unrelated account, Defendants have diverted significant corporate funds and assets to themselves.

Id. ¶ 44.

Count Five, "Corporate Waste", is identical except the counterpart to Paragraph 44 ends "Defendants have wasted significant corporate funds and assets" and another paragraph refers to "waste" rather than "misappropriation." Id. ¶¶ 49-50.

Neither Count Four nor Count Five alleges that Mr. Gildea engaged in any specific act of corporate misappropriation or waste, or received any benefit from such conduct.

Count Six alleges, in four paragraphs, breach of fiduciary duty against only Mr. Bricklin.

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[3] Counts Four and Five state that the claim is brought derivatively because it would be futile to demand VV to bring the claim. ¶¶ 42, 47.

ARGUMENT

POINT I

THE CLAIMS AGAINST MR. GILDEA SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

A. Plaintiff Has Not Alleged Federal Claims Against Mr. Gildea and Dismissal of the One Federal Claim Asserted Against Two Other Defendants Would Require Dismissal of the Rest of the Case.

Plaintiff does not purport to allege any federal claims against Mr. Gildea and its only one federal claim, Count Three, alleges a federal securities law claim against only two of the five other defendants, namely, Mr. Bricklin and VV.[4]

For the reasons set forth in the Bricklin defendants' pending motion to dismiss, the Third Count should be dismissed pursuant to FRCP 12(b)(6), FRCP 9(b), and the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b) for failure to state a claim and to plead with requisite particularity. See Points I-III of Memorandum of Defendants Visionary Vehicles LLC, Malcolm Bricklin, Jonathan Bricklin, Barabara Bricklin Jonas, Michael Jonas, and Sania Teymeny in Support of their Motion to Dismiss ("VV Memorandum").

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[4] Plaintiff does not and cannot allege that Mr. Gildea aided and abetted Mr. Bricklin and VV to violate § 10(b) of the Securities and Exchange Act of 1934. The Supreme Court has held that there is no private cause of action for aiding and abetting another in the commission of a § 10(b) violation. Central Bank of Denver N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191, 114 S. Ct. 1439 (1994). Secondary actors like accountants may be only held liable as "primary violators" under § 10(b) "if all the requirements for primary liability are met...." See Wright v. Ernst & Young LLP, 152 F.3d 169, 175 (2d Cir. 1998) (quoting Central Bank, 511 U.S. at 191). To impose liability under § 10b, that particular "'defendant must actually make a false or misleading statement . . . . Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10b.'" Wright, 152 F.3d at 175 (quoting Shapiro v. Cantor, 123 F.3d 717, 720 (2d Cir. 1997)).

As set forth in Point IV of the VV Memorandum, dismissal of Count III would warrant dismissal of the the rest of the case. See, e.g., Greenwald v. Orb Communications & Marketing, Inc., 192 F. Supp. 2d 212, 227 (S.D.N.Y. 2002)("state law claims are dismissed because there is no appropriate basis for the Court's jurisdiction over these state law claims in light of the dismissal of the federal [claims]").

B. Even if it Denies the VV Motion, the Court Should Decline to Exercise Supplemental Jurisdiction Over Mr. Gildea.

Although not referenced in the Complaint, pursuant to 28 U.S.C. § 1367(a), where, as here, a federal district court has original jurisdiction over some defendants in an action due to the nature of the claims against those defendants, it also has supplemental jurisdiction over pendant parties and claims, so long as the Court finds that the cause of action against those other defendants arises from the same case or controversy. See Herrick Co., Inc. v. SCS Communications, Inc., 251 F.3d 315, 326 (2d Cir. 2001).

Nevertheless, should this Court somehow deny the VV motion, it should still dismiss plaintiff's Complaint because questions of state law predominate over plaintiff's sole federal claim. Pursuant to 28 U.S.C. § 1367(c), this Court may, in its discretion, decline to exercise supplemental jurisdiction where:

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

"Once a court identifies one of the factual predicates which corresponds to one of the subsection 1367(c) categories, the exercise of discretion is informed by whether remanding the pendent state claims comports with the underlying objective of most sensibly accommodating the values of economy, convenience, fairness, and comity." Itar-Tass Russian News Agency v. Russian Kurier, Inc., 140 F.3d 442, 446 (2d Cir. 1998)(internal citations and quotations omitted).

This case centers around allegations of common law fraud (Count One), aiding and abetting fraud (Count Two), misappropriation of corporate assets (Count Four), corporate waste (Count Five), and breach of fiduciary duty (Count Six), notwithstanding that plaintiff has failed to allege such claims with sufficient particularity.

Plaintiff's purported federal securities claim is asserted against only Mr. Bricklin and VV and revolves around only certain alleged misrepresentations made by one of the defendants. By contrast, the state law claims seek to impose liability on five additional defendants and would require scrutiny of an array of corporate expenditures. Consequently, they would thus result in vastly more judicial resources to adjudicate (and private resources to litigate) than would the sole federal law claim. See Diven v. Amalgamated Transit Union Int'l & Local 689, 38 F.3d 598, 601 (D.C. Cir. 1994) (noting that the expenditure of more judicial resources to adjudicate state law claims over federal claims is a factor that courts should consider).

Permitting litigation of all claims in this Court would be equivalent of permitting "a federal tail to wag what is in substance a state dog." Borough of West Mifflin v. Lancaster, 45 F.3d 780, 789 (3d Cir. 1995) (internal quotations and citations omitted). Accordingly, whether or not plaintiff's sole federal claim survives, the Court should decline to exercise jurisdiction over Mr. Gildea.

POINT II

SHOULD THE COURT EXERCISE JURISDICTION OVER MR. GILDEA IT SHOULD DISMISS THE COUNTS ASSERTED AGAINST HIM.

A. Plaintiff has Failed to Plead its Claim for Aiding and Abetting Fraud with Requisite Particularity.

To establish liability for aiding and abetting fraud under New York law, a plaintiff must show: (1) that a fraud existed; (2) that the defendant had actual knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission. Lerner v. Fleet Bank, N.A., 459 F.3d 273, 292 (2d Cir. 2006); JP Morgan Chase Bank v. Winnick, 406 F. Supp. 2d 247, 252 (S.D.N.Y. 2005); Vtech Holdings Ltd. v. Pricewaterhouse Coopers LLP, 348 F. Supp. 2d 255, 269 (S.D.N.Y. 2004); see also Franco v. English, 210 A.D.2d 630, 633, 620 N.Y.S.2d 156, 159 (3d Dep't 1994) (requiring "nexus between the primary fraud, [defendant's] knowledge of the fraud and what it did with the intention of advancing the fraud's commission").

It is well-settled that the heightened pleading standard of Fed. R. Civ. P. 9(b), which states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity", applies to claims against accountants for aiding and abetting common law fraud. See, e.g., Vtech, 348 F. Supp. 2d at 269 (dismissing aiding and abetting fraud claim against accounting firm pursuant to Rule 9); Ross v. Patrusky, Mintz & Semel, 90 Civ. 1356, 1997 U.S. Dist. LEXIS 5726, at *45 (S.D.N.Y. Apr. 28, 1997). Rule 9(b) requires that a plaintiff must allege facts that give rise to a "strong inference" of fraudulent intent. Kramer v. Time Warner, Inc., 937 F.2d 767, 776 (2d Cir. 1991); CMNY Capital, L.P. v. Deloitte & Touche, 821 F. Supp. 152, 155 (S.D.N.Y. 1993).

Moreover, Rule 9(b) pleadings cannot be based on information and belief. See Fradet v. Schwartz, No. 95 Civ. 3943 (LLS), 1996 U.S. Dist. LEXIS 13391, at *13-14 (S.D.N.Y. Sept. 12, 1996) (citation omitted); Segal v. Gordon, 467 F.2d 602, 608 (S.D.N.Y. 1972); Toussaint v. JJ Weiser & Co., No. 04 Civ. 2592, 2005 U.S. Dist. LEXIS 2133, at *32 (S.D.N.Y. Feb. 9, 2005) ("To base a general allegation of fraud on allegations that themselves rest 'on information and belief' without any factual support or source does not satisfy Rule 9(b)."); see also DiVittorio v. Equidyne Extractive Industries, Inc., 822 F.2d 1242, 1247 (2d Cir. 1987) (recognizing, as an exception to the rule, that "fraud allegations may be . . . alleged [on information and belief] as to facts peculiarly within the opposing party's knowledge, in which event the allegations must be accompanied by a statement of the facts upon which the belief is based.").

That Rule 9(b) requires more than pleading upon "information and belief" is consistent with one of the purposes of the rule – to discourage the filing of complaints "as a pretext for discovery of unknown wrongs." Gross v. Diversified Mortgage Investors, 431 F.

Supp. 1080, 1087 (S.D.N.Y. 1977); see Decker v. Massey-Ferguson, Ltd., 681 F.2d 111, 116 (2d Cir. 1982) ("Rule 9(b) [fails] in its purpose if conclusory generalizations . . . permit a plaintiff to set off on a long and expensive discovery process in the hope of uncovering some sort of wrongdoing . . . ."). "[T]he protection of Rule 9(b) is particularly important where the defendants are accountants . . . . whose reputations in their field of expertise are most sensitive to scandal." Gross, 431 F. Supp. at 1088.

1. Existence of Fraud Not Alleged

As stated above, to establish liability for aiding and abetting fraud under New York law, a plaintiff must first plead that a fraud existed. See Lerner, 459 F.3d at 292. For the reasons set forth in the VV Memorandum, plaintiff has failed sufficiently to allege the existence of fraud. Because the aiding and abetting claim against Mr. Gildea is derivative of the underlying fraud claims against Mr. Bricklin and VV, the aiding and abetting claim against Mr. Gildea must be dismissed if the Court dismisses the underlying fraud claims, which it should. See FDIC v. Cohen, No. 95 Civ. 683 (LLS), 1996 U.S. Dist. LEXIS 2247, at *41 (S.D.N.Y. Feb. 29, 1996) (citing Morgan v. Prudential Group, 81 F.R.D. 418, 425 n. 6 (S.D.N.Y. 1978)).

2. Actual Knowledge Not Alleged

The second element of an aiding and abetting fraud claim under New York law requires a plaintiff to allege that the aider and abettor had "actual knowledge" of the primary wrong. See Lerner, 459 F.3d at 292; see also Wight v. Bankamerica Corp., 219 F.3d 79, 91 (2d Cir. 2000) (stating that "knowledge of the underlying wrong" is "required element" under New York law); Allied Irish Banks, P.L.C. v. Bank of America, N.A., No. 03 Civ. 3748, 2006 U.S. Dist. LEXIS 4270, at *33 (S.D.N.Y. Feb. 2, 2006) ("New York has not adopted a constructive knowledge test for aiding and abetting liability. Rather, actual knowledge is required.").

Here, plaintiff merely alleges, in the most conclusory fashion, that "upon information and belief" defendant Gildea, among others, "knowingly and recklessly provided substantial assistance to the frauds committed by Malcolm Bricklin." Compl. ¶ 33. Plaintiff further alleges, upon "information and belief," that Mr. Gildea "was responsible for, or participated in, . . . the improper accounting" purportedly alleged in the Complaint. See Compl. ¶ 9. These allegations against Mr. Gildea are based upon "information and belief" and thus, violate the general rule that averments of fraud cannot be based upon "information and belief." For that reason alone plaintiff's claims against Mr. Gildea should be dismissed. Nor has plaintiff otherwise alleged what facts, if any, that "belief" is based. Accordingly, the narrow exception to the rule that Rule 9(b) pleadings cannot be based on information and belief," recognized in the DiVittorio case supra, does not save plaintiff's fatally deficient Complaint. See DiVittorio, 822 F.2d at 1247.

As discussed in the VV Memorandum, plaintiff has failed to identify with particularity any fraud alleged to have been committed by the Bricklin defendants. Instead, plaintiff summarily alleges that Mr. Bricklin made certain "representations" that, "upon information and belief, were known to be false by Bricklin when made by him . . . ." See Compl. ¶ 22; supra at 4-5. Plaintiff fails to allege, inter alia, how the statements were fraudulent, or how Mr. Gildea knowingly aided and abetted Mr. Bricklin's claimed fraudulent representations. Significantly, plaintiff fails to allege that Mr. Gildea had actual knowledge of allegedly fraudulent nature of Mr. Bricklin's representations, let alone claim that Mr. Gildea knew that Mr. Bricklin even had any communications with plaintiff.

Moreover, to the extent the Complaint simply implies that Mr. Gildea, as Mr. Bricklin's alleged personal accountant and VV's corporate accountant, should have known of Mr. Bricklin's alleged frauds, that too fails to satisfy the "actual knowledge" or pleading requirements under Fed. R. Civ. P. 9(b). See, e.g., Ryan v. Hunton & Williams, No. 99 Civ. 5938, 2000 U.S. Dist. LEXIS 13750, at *26 (E.D.N.Y. Sept. 20, 2000) (allegations of "suspected fraudulent activity" do not raise an inference of actual knowledge of fraud); National Westminster Bank v. Weksel, 124 A.D.2d 144, 149-50, 511 N.Y.S.2d 626, 630 (1st Dep't 1987).

3. Substantial Assistance Not Alleged

The third element of an aiding and abetting fraud claim is substantial assistance. See Lerner, 459 F.3d at 292. "A defendant provides substantial assistance only if [he] 'affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables [the fraud] to proceed.'" Nigerian Nat'l Petroleum Corp. v. Citibank, N.A., No. 98 Civ. 4960, 1999 U.S. Dist. LEXIS 11599, at *26 (S.D.N.Y. July 30, 1999) (quoting Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 284 (2d Cir. 1992)).

Again, plaintiff has failed to allege how Mr. Gildea substantially assisted in Mr. Bricklin's and VV's alleged fraud. Plaintiff simply alleges, without any factual support, that Mr. Gildea, among others, "knowingly or recklessly provided substantial assistance to the frauds committed by Malcolm Bricklin." Compl. ¶ 33. Moreover, plaintiff's allegation that Mr. Gildea served as an accountant for Mr. Bricklin and VV does not, without more, constitute substantial assistance. See In National Westminster Bank v. Weksel, 124 A.D.2d 144, 149-50, 511 N.Y.S.2d 626, 630 (1st Dep't 1987) (holding that a plaintiff's allegation that a law firm had access to all of the client's papers did not adequately plead actual knowledge of the client's underlying fraud.).

The lack of particularity of the Complaint would unfairly prejudice Mr. Gildea's defense of this matter by depriving him of fair notice of the parameters of plaintiff's claims. See Rombach v. Chang, 355 F.3d 164, 171 (2d Cir. 2004) (stating that among the purposes of Rule 9 pleading requirements is to "provide a defendant with fair notice of a plaintiff's claim"). In the absence of specific allegations, plaintiff's claim against Mr. Gildea for aiding and abetting fraud (Count Two) must be dismissed.

B. Plaintiff has Failed to Sufficiently Allege Causes of Action for Misappropriation of Corporate Funds and Corporate Waste.

Like its allegations of fraud and aiding and abetting fraud, plaintiff's claims of misappropriation and waste against Mr. Gildea are subject to the heightened pleading requirements of Rule 9(b). See Stern v. General Electric Co., 924 F.2d 472, 476 (2d Cir. 1991) (waste); Donahoe v. Polar Molecular Corp., No. 86 Civ. 4664, 1987 U.S. Dist. LEXIS 11613 (S.D.N.Y. Dec. 18, 1987) (misappropriation).

While plaintiff claims that "All Defendants" have engaged in misappropriation and waste, see Counts Four and Five, the Complaint is devoid of any factual allegation that Mr. Gildea engaged in any such conduct or had the authority to do so. Instead, the Complaint contains a laundry list of allegations of misappropriation and waste against the Bricklin Defendants only. Accordingly, plaintiff's claims of misappropriation (Count Four) and waste (Count Five) must be dismissed as against defendant Gildea.

CONCLUSION

For the reasons set forth above and in the VV Memorandum, the claims asserted against Mr. Gildea should be dismissed and Mr. Gildea should be granted such other relief as the Court may deem just and proper.

Dated: New York, New York
August 2, 2007

Respectfully submitted,

LANDMAN CORSI BALLAINE & FORD P.C.

By: [signature]

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